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SERVICE DATE – JULY 13, 2006

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34883

PORTLAND AND WESTERN RAILROAD, INC. – TRACKAGE RIGHTS EXEMPTION –
UNION PACIFIC RAILROAD COMPANY

Decided: July 12, 2006

On June 29, 2006, Portland and Western Railroad, Inc. (PNWR), filed a notice of exemption pursuant to 49 CFR 1180.2(d)(7) to acquire, by assignment from BNSF Railway Company (BNSF), nonexclusive trackage rights over: (1) the rail line owned by Union Pacific Railroad Company (UP) between East Portland, OR, in the vicinity of Milepost 770.3 and Labish, OR, in the vicinity of Milepost 720.9, a distance of approximately 49.4 miles (Joint Trackage); (2) the rail line owned by Portland Terminal Railroad Company (PTR) between PTR Milepost 0.0 and BNSF Mileposts 0.69 and 0.91 in Portland, OR; and (3) the railroad portion of UP's Willamette River Bridge in Portland. According to PNWR's notice, the proposed trackage rights would allow PNWR the right to serve as BNSF's agent over the Joint Trackage, including the right to access the Joint Trackage via PTR's rail line and UP's Willamette River Bridge. The exemption became effective on July 6, 2006.

On July 10, 2006, John D. Fitzgerald, for and on behalf of the United Transportation Union-General Committee of Adjustment (UTU/GO-386), filed a petition seeking a stay of the operation of the notice of exemption. UTU/GO-386 asserts that, despite the July 6, 2006 effectiveness of the exemption, a stay may be issued prior to the consummation of the transaction, and that consummation cannot occur until July 16, 2006, at the earliest.¹

UTU/GO-386 asserts that PNWR's notice should be stayed until UTU/GO-386's petition to reject/revoke is filed with the Board, and decided by the Board, and until any Board approvals or exemptions are determined for related notices involving BNSF/UP restructuring of operations in the area between Seattle, WA, and Eugene, OR. UTU/GO-386 argues that the trackage rights exemption is not appropriate here because PNWR is acting as agent for BNSF and is not a

¹ The labor protective conditions of Norfolk and Western Ry. Co. – Trackage Rights – BN, 354 I.C.C. 605 (1978), as modified in Mendocino Coast Ry. Inc. – Lease and Operate, 360 I.C.C. 653 (1980), require advance notice of 20 days to railroad employees prior to consummation of the transaction. UTU/GO-386 has submitted evidence indicating that the railroad employees were not informed of the transaction until June 26, 2006 (with a minor modification on June 28, 2006), which would indicate that the transaction cannot be consummated until July 16, 2006.

common carrier in its own right over the line. UTU/GO-386 argues that PNWR is at most a contract carrier, and thus not qualified to invoke the trackage rights class exemption. UTU/GO-386 also argues that PNWR cannot under these circumstances be deemed to acquire and operate BNSF's line under 49 U.S.C. 10902 because BNSF remains the actual common carrier on the line. UTU/GO-386 further argues that BNSF employees would be injured by the loss of two crews, embracing six employees, and that these employees would not likely be compensated for losses sustained if UTU/GO-386 subsequently prevails. Finally, UTU/GO-386 argues that PNWR would not be injured by a stay. PNWR filed a response on July 11, 2006.

DISCUSSION AND CONCLUSIONS

The standards governing a stay request are: (1) whether petitioner has a strong likelihood of prevailing on the merits; (2) whether petitioner will be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether issuance of a stay is in the public interest. Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc., 559 F.2d 841,843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958).

As the movant, it is UTU/GO-386's obligation to justify granting such extraordinary relief. Cuomo v. United States Nuclear Regulatory Comm., 772 F.2d 972, 978 (D.C. Cir. 1985). UTU/GO-386 has failed to meet its burden of demonstrating that the stay criteria are satisfied. Based on the evidence presented, it appears that the transaction at issue does require Board authorization. See Assoc. of P&C Dock Longshoremen v. The Pitts. & Conneaut, 8 I.C.C.2d 280 (1992), and cases cited therein. But that is a matter that can be further pursued, if UTU/GO-386 wishes to do so, in a petition to reject or revoke the notice of exemption.

UTU/GO-386 has failed to demonstrate irreparable harm to affected employees absent a stay of the effectiveness of the exemption authorizing the trackage rights. Any BNSF employees adversely affected by the grant of trackage rights will be subject to the standard labor protective conditions imposed in this proceeding. Employees may attempt to show that those protections are insufficient to address the harm from this grant of trackage rights, but UTU/GO-386 has not made such a showing on this record.

Nor has UTU/GO-386 demonstrated that a stay would not harm other parties, or that a stay would be in the public interest.

For these reasons, UTU/GO-386's petition for stay is denied.

It is ordered:

1. UTU/GO-386's petition for stay is denied.

2. This decision is effective on its service date.

By the Board, W. Douglas Buttrey, Chairman.

Vernon A. Williams
Secretary